THE AMERICAN SUGAR REFINING COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Appellee.

THE SAME

Appellant,

vs.

THE SAME

Appellee.

PETITION FOR WRIT OF CERTIORARI.

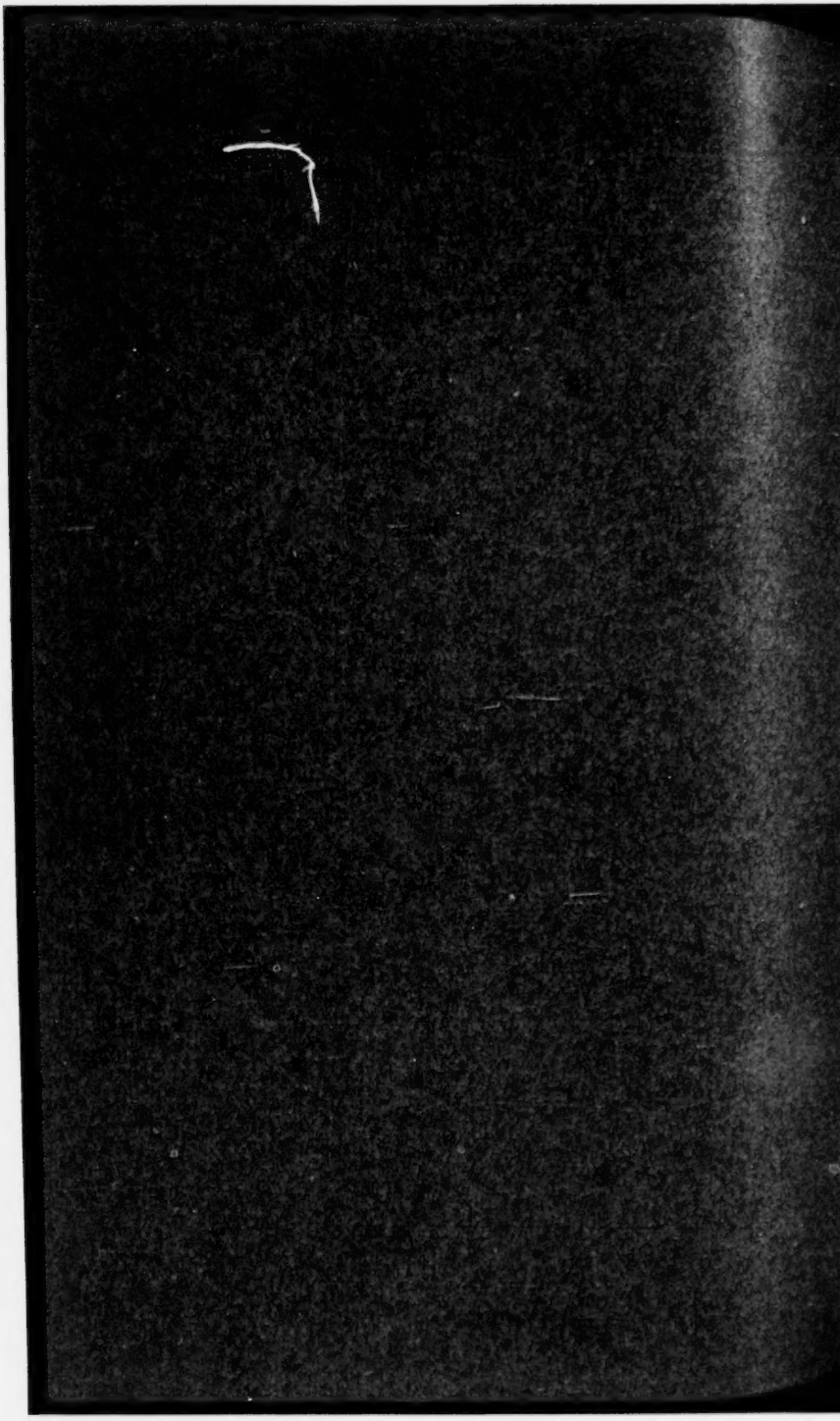
JOHN E. PARSONS,

Attorney for Petitioner,

No. 39 Broadway,

Borough of Manhattan,

New York City.



TAKE NOTICE that the within petition for a writ of *certiorari* will be presented, and an application made for the issuing of the writ, to the Supreme Court of the United States, on Monday, the 19th day of March, 1900, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated March 8th, 1900.

Yours, &c.,

JOHN E. PARSONS,

Of Counsel for American Sugar Refining Company,

Appellant,

111 Broadway,

New York, N. Y.

To HON. HENRY L. BURNETT,

U. S. District Attorney for the Southern District of New York.

In the Supreme Court of the United States.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

vs.

THE UNITED STATES,
(2676) Appellee.

THE SAME,
Appellant,

vs.

The SAME,
(2689) Appellee.

Petition for Writ of *Certiorari*.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of The American Sugar Refining Company, a corporation organized and existing under the laws of the State of New Jersey, for a writ of *certiorari* directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the causes above entitled, respectfully shows to this Court:

I. Heretofore and on or about the 31st day of January, 1895, your petitioner imported from Brazil by the Steamship "Cuvier," and entered for consumption at the Custom House, in the City of New York, a certain cargo of sugar, and thereafter, on the 11th, 15th and 30th days of March, 1897, by the Steamships "Richmond," "John Swan" and "Bellauri," respectively, three certain other cargoes of sugar. All of said merchandise was classified and assessed for duty at

forty per centum, not only of the actual market value and wholesale price thereof as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of Brazil, whence it was imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, but also at forty per centum of an additional amount per hundredweight, supposed to cover an alleged increase in value of the sugar during the voyage of importation by reason of drainage upon the voyage.

II. In the case of the "Richmond" and the "John Swan" the fact of this addition of 1s. 1d. per cwt. by the Appraiser to the market value of the merchandise when shipped appears from reports from the Appraiser to the Collector as follows (Case 2676, fols. 87–89):

"TO THE COLLECTOR:

"Pursuant to Department letter of September 21st, 1895, etc., I respectfully report upon invoice hereto annexed as follows: Value of sugar per unit of quantity advanced from 6s. 8d. cwt. 87°, the market value when shipped, to 7s. 9d. cwt. 87° in the condition landed, owing to its increased value due to drainage on the voyage of importation."

In the case of "Bellauri," the fact of a similar addition of 9½d. per cwt. by the Appraiser to the market value of the merchandise when shipped appears from the report of the appraiser to the Collector as follows (Case 2676, fol. 89):

"Value of sugar per unit of quantity advanced from 7s. 2d. cwt. 86°, the market value when shipped, to 7s. 11½d. cwt. 86° in the condition landed, owing to its increased value due to drainage on the voyage of importation."

In the case of the "Cuvier" the fact of a similar addition appears from the testimony (Case No. 2689, fols. 63–67).

III. Your petitioner in each case duly protested and appealed upon the ground that under the proper construction of the statute the rate and amount of duty chargeable upon the merchandise could be only forty per centum of its market value when shipped, and that duty upon "its increased value due to drainage on the voyage of im-"portation" was illegally exacted. The Board of General Ap-

praisers upheld the decision of the Collector as to the rate and amount of duty chargeable upon the merchandise ; whereupon your petitioner duly applied to the Circuit Court of the United States for the Southern District of New York for a review of the questions of law and fact involved in such a decision.

IV. In the Circuit Court the decision of the Board of General Appraisers was affirmed ; upon the ground, as appears from its opinion (Case 2689, pp. 30 to 32 ; Case 2676, pp. 37 to 39), that under the proper construction of the Customs Administrative Act of 1890 the dutiable value of imported merchandise is " the value in " the foreign market of the said merchandise in the condition in " which it arrives at the port of New York," and not the value in the foreign market of the merchandise in the condition in which it was there shipped ; where these conditions are different and result in an increase in the value of the merchandise at the end of the voyage.

V. From the judgment of the Circuit Court entered upon this decision your petitioner duly appealed to the Circuit Court of Appeals for the Second Circuit. In that Court the decision of the Circuit Court was affirmed. The Court was of the opinion that the word " condition " in section 19 of the Customs Administrative Act " is broad enough to include any state or situation," and that, therefore, the contention of the importers that the act required the duty to be assessed upon the value of the merchandise in its condition as well in respect of the percentage of moisture which it then contained, as, otherwise, was " justified by the language of the statute, if literally construed." The Court further held, however, that the literal construction of the act " was not sound ; " and that the word " condition " in the act is not used in the " broad " sense as including " any state or situation ; " but that it means simply " the state or condition of the preparedness of the merchandise for shipment when sold."

VI. The questions of law arising upon this record, which, as your petitioner is advised by its counsel and verily believes, are of sufficient gravity and public importance to render it proper, in the interest of jurisprudence and uniformity of decision, that the Supreme Court shall review the conclusions reached thereupon by the Circuit Court of Appeals, are the following :

(1) Whether or not the condition in which, under the provisions of section 19 of the Customs Administrative Act, imported merchandise is to be valued at the time of its exportation to the United States, is its condition at the time of its exportation from the foreign country, or its condition at the time of its entry at the Custom House in the United States.

(2) Whether or not a decrease or increase in the value of of an imported article from its value at the time of exportation, occurring during the voyage from the port of exportation, to the United States, can be considered by the Appraiser in assessing the duty thereupon ; except in the single case provided for by section 23 of the Customs Administrative Act, where, owing to damage during the voyage, the importer is willing to abandon to the Government at least ten per centum of the total value or quantity of the invoice.

(3) Whether or not, in appraising merchandise, such as iron ore, sugar, etc., of which "water mechanically mixed is one of the nat- "ural and constant constituents," the appraiser, in assessing duty upon it, is bound to consider the percentage of water so contained in it at the time as of which he is by statute required to value it, or to consider only the percentage of water which it may so contain after its arrival in the United States.

(4) Whether, under the provisions of the Customs Administrative Act, the standard of value upon which the importer must pay duty is a shifting one—to wit, the value of the merchandise either at the time and place of exportation or at the time and place of importation, whichever may be the higher—or whether it is always the same ; and, if so, which of the two is, under the provisions of the statute, the standard of value.

VI. Your petitioner is advised and believes that the present case is one where it is proper for this court to issue a writ of *certiorari*, for the following reasons :

(1) The courts below have contessedly departed from the plain language of the statute in order to deprive the importer of the benefit of the fact that the merchandise imported by him is by virtue of its inherent qualities—and not by any intentional or artificial adaptation of it to the provisions of the statute—thereby subjected to a lower rate of duty than that which has been actually imposed.

(2) So far as is known, the case at bar was a case of first impression in the courts below, no other court having held that the phrase,

"in the condition in which such merchandise is there bought and "sold for exportation to the United States," was not to be given what the courts below have refused it, its "literal construction."

(3) The provision of the law in question, the literal meaning of which has been denied to it by the decision below, is one of daily application throughout all the ports of entry in the country. Upon the interpretation of it, the payment of large amounts of money depends. Upon only the four cargoes involved in these cases, the amount of duties payable by your petitioner have been increased by the rulings below in an amount exceeding $12,000.

It is a matter of the utmost importance to every importer, not only that no heavier duty shall be exacted upon his imports than was intended by Congress, but especially that in his buying, manufacturing and selling, he shall be able to rely with absolute certitude upon the standard of value which the government will apply to the imports both of himself and of his business rivals, in ascertaining the amount of duties to be exacted upon them.

But until this court shall review the determination of the court below, and either affirm or reverse it, it must remain wholly uncertain to what extent, if at all, the courts of other circuits will follow the action of the courts of the Second Circuit in refusing to give to the language of the act in question its literal interpretation. Until such determination by this court, therefore, all importers of merchandise subject to an *ad valorem* duty and liable to undergo changes in its condition during the voyage of importation, and a consequent increase or decrease in its value after its shipment, will be seriously embarrassed in the conduct of their business by the following, among other, considerations:

(a) Importers of such merchandise in other circuits than the second circuit must remain uncertain whether in any given case their merchandise will be appraised at its value when exported or at its value when imported. It will, therefore, be impossible for them to reckon in advance what will be the cost of their finished product.

(b) Importers of such merchandise in the Second Circuit must remain subject to the peril that the courts in other circuits may at any time refuse to follow to its full extent the decision of the court below; and may by such refusal at any time place them at a serious disadvantage with their competitors in business in other circuits.

(4) With great respect to the courts of the Second Circuit, it is submitted that their decision refusing to give to the language of

the Customs Administrative Act what they admit to be its literal meaning, is erroneous; and one which the courts of other circuits are altogether likely to refuse to follow, and this court, if the case shall be tried before it, to reverse. Among other grounds for this conclusion, stated in the appellant's brief below and herewith submitted, are the following:

(a) The decision is in avowed conflict with a fundamental rule of interpretation of tariff statutes, to wit, that if the literal construction of the language used enables the importer to escape with a less tax than that which the looser and more liberal construction of it would impose, the importer is entitled to the literal interpretation (United States v. Isham, 17 Wall., 496; American Net & Twine Co. v. Worthingto, 141 U. S., 468).

(b) The decision below ignores, and seems to be in conflict with, Section 2904 of the Revised Statutes, still in force, as follows:

" When the duty upon any imports shall be subject to be levied " upon the true market value of such imports in the principal " markets of the country from whence the importation has been " made, or at the port of exportation, the duty shall be estimated " and collected upon the value *on the day of actual shipment* when- " ever a bill of lading shall be presented," etc.

(c) The decision below ignores, and seems to be in conflict with, that of this court in the analogous case of *Earnshaw v. Cadwalader*, 145 U. S., 247, 259; where it was held by this court that it is the duty of the collector to assess the duty upon merchandise of which " water " mechanically mixed is one of the natural and constant constitu- " ents," in its condition at the time as of which he was required to appraise it, including whatever percentage of water it then contained, and without regard to the fact that this water is subsequently in part or in whole eliminated.

VII. The case is one in which the judgment of the said Circuit Court of Appeals, which has been entered, is made final by law, and the same cannot be reviewed except by *certiorari* issued out of this court. Accompanying this petition is a certified copy of the entire record in the said Court of Appeals, as required by Rule XXVII., Section 3, including a copy of the opinion of the said court.

Wherefore, your petitioner prays that this Honorable Court may be pleased to grant a writ of *certiorari* in the above-entitled cases to the said Circuit Court of Appeals for the Second Circuit to bring up such cases for its review and determination, and for such proceedings as shall seem best.

Dated New York, March 6th, 1900.

AMERICAN SUGAR REFINING COMPANY,
by
H. O. HAVEMEYER,
President,
Petitioner.

JOHN E. PARSONS,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
State of New York,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

HENRY O. HAVEMEYER, being duly sworn, deposes and says that he is the President of the American Sugar Refining Company, the petitioner named in the foregoing petition, and that the said petition is true to the best of his knowledge and belief.

H. O. HAVEMEYER.

Sworn to before me this 6th day of March, 1900.

HERBERT FRAZIER,
[SEAL.] Notary Public,
N. Y. Co.

I hereby certify that I have examined the foregoing petition, and that in my opinion the same is well founded; and that the cause is one in which the prayer of the petition should be granted by the court.

JNO. E. PARSONS,
Of Counsel.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

559

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellee.
(2676.)

SAME

VS.

SAME.
(2689.)

Points for Appellant.

Appeals from judgments of the Circuit Court of the United States for the Southern District of New York, entered upon a decision of Judge TOWNSEND *affirming the action of the Board of General Appraisers in assessing duties upon certain cargoes of sugar imported in March, 1897, by the appellants, on the vessels "John Swan," "Richmond," "Bellaura" and "Cuvier."*

In three of these shipments the appraiser reported to the Collector as follows:

"The value of sugar per unit of quantity advanced "from 6s. 8d. Cwt. 87° [in the case of the 'Bellaura,'

" 7s. 2d. Cwt. 86°], the market value when shipped, to " 7s. 9d. Cwt. 87° [in the case of the 'Bellaura,' 7s. " 11½d. Cwt. 86°], in the condition landed owing to " its increased value due to drainage on the voyage of " importation."

In the fourth case the evidence shows that the appraisement was made in the same way.

In each case the Collector decided that the "rate " and amount of duties to be paid on such " merchandise, and the dutiable costs and " charges thereon according to law," was forty per cent., not of its value when shipped, but of its greater value " in the condition landed, " owing to its increased value due to drainage on the " voyage of importation." The importers duly protested that, under the proper construction of the law, the rate and amount of duty chargeable upon the merchandise could be only upon its market value when shipped, and that duty upon "its increased value due " to drainage upon the voyage of importation" was illegally exacted. The decision of the Collector upon this question of law was affirmed by the Board of General Appraisers and by Judge TOWNSEND in the Circuit Court. The importers now appeal to this Court.

The material facts, about which there is no dispute, are as follows:

Brazil sugars of the kind in question "at the time " of exportation to the United States" and "in the " condition in which such merchandise is there bought " and sold for exportation to the United States," usually contain from five to eight or nine per cent. of water (Case No. 2689, fol. 82). Sugar containing these percentages of water will, during the voyage from Brazil to the port of New York, lose in weight by drainage about double the percentage of water contained in it—*i. e.*, from ten to sixteen per cent. (Case No. 2689, fol. 81; Case No. 2676, fol. 101). As the amount of drainage is thus about double the percentage of moisture, it is obvious *a priori* and is proved to be the fact, that this drainage consists not of water, but of molasses, sometimes as thick as

to classify as sugar (Case No. 2676, fols. 104, 105; Case No. 2,689, fol. 75). Drainage of this kind "is too fine an article to throw away" and there are dealers in it in this city who regularly buy it from the captains of vessels, invoice it and pay duty on it (Case No. 2,676, fol. 105). The appraisement in this case, however, necessarily and avowedly proceeded upon the theory "that the decrease in weight is due simply to "the loss of so much water" (Case, No. 2,689, fol. 68).

The net landed weight in New York of these Brazil sugars being, as above explained, generally considerably less than the weight when shipped, and by a greater amount than the Brazil shipper always allowed for in drawing against it upon the importer, it has become customary to insert in the contract of sale, a guarantee that the loss in weight shall be a certain percentage, estimated by experts as the probable drainage of the particular cargo. If the loss is less than the stipulated percentage the seller receives an additional payment in proportion; if it is greater he makes a corresponding allowance from the purchase price (Case, No. 2,689, fols. 63, 81). It may also be stated that a similar stipulation is usually made as to the degree at which the sugar shall test under the polariscope, the seller receiving an additional price if it tests higher than the stipulated degree and making a corresponding allowance if it tests less. This polariscopic test is made in New York by experts agreed upon between the buyers and sellers; and under a ruling of the Secretary of the Treasury was, under the Act of 1894, commonly accepted by the appraisers as the correct one without the employment by them of independent experts. The matter of this polariscopic test, and of this agreement between the importers and the Government with regard to it, is in no way involved in this appeal; and is only referred to to explain certain testimony interjected into the case in regard to it by General Appraiser Sharretts (Case, 2689, fols. 64, 69-71, 73, 74).

The Customs Administrative Act of 1890 provides as follows:

SEC. 19. " Whenever imported merchandise is subject to an *ad valorem* rate of duty * * * the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States. * * * The words ' value ' or ' actual market value,' whenever used in this act, or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in this section."

Prior to the passage of this act, the statutory provision on this subject had been the following :

U. S. Rev. St., Sec. 2906 :

" When an *ad valorem* rate of duty is imposed on any imported merchandise * * * the Collector within whose district the same shall be imported or entered, shall cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised ; and such appraised value shall be considered the value upon which duty shall be assessed."

The change wrought in the law by the Act of 1890 was wholly in the direction of making it clear beyond cavil that the place, time and condition at and in which imported merchandise shall be valued in assessing *ad valorem* duties upon it shall be, respectively, (1) the port of export, not the port of import ; (2) the date of export, not the date of import ; (3) the condition when exported, not the condition when imported. To this end, the expression of the Revised Statutes, " the period of exportation," was changed to the more definite expression, " the time of " exportation," and the entirely new provision inserted : " in the condition in which such merchandise is there " bought and sold for exportation to the United " States."

It is in the face of this provision of the statute that the Government has, in the Circuit Court, succeeded in its effort to uphold the action of its appraiser, by whom, in his own language, "the value of sugar per "unit of quantity" was "advanced from 6s. 8d. Cwt. "87°, the market value when shipped, to 7s. 9d. Cwt. "87°, in the condition landed, owing to its increased "value due to drainage on the voyage of importation."

The opinion of the learned Judge presiding in the Circuit Court indicates that he overlooked this provision, first imported into the law by Section 19 of the Customs Administrative Act of 1890, that the condition in which merchandise must be valued, for the purpose of assessing duties upon it, is "the condition "in which such merchandise is there [viz., in the coun-"try whence imported] bought and sold for exporta-"tion to the United States." He not only cites as the statutory provision on the subject, not Section 19, but Section 10, which does not contain the provision in question (Case 2676, fol. 113); but he evidently understood that what is the proper condition in which the merchandise should be valued is still a matter of contention, open to argument.

He says:

"Counsel for the importer contends that this language refers to the merchandise in its condition in the foreign port and its actual value at the time of exportation to the United States in the principal markets of the country whence it is imported. He claims that the phrase 'actual market value of the merchandise' does not refer to the merchandise in its condition when it reached the port of New York, because," etc., etc. * * *

"Counsel for the Government contends that the language of Section 10 refers to the value in the foreign market of said merchandise in the condition in which it arrives at the port of New York."

The Court below here perhaps did injustice to the counsel for the Government in thus putting him in contention, not with the counsel for the importer, but with the plain language of the statute. The opinion, however, then proceeds to state what are, as the im-

porters understand, actually the grounds on which the Government seeks to sustain the appraiser in his apparent departure from the provisions of the statute, to wit:

"Owing to drainage, there are less pounds of sugar on arrival here than when the ship left Brazil, but the cargo is actually worth as much as when it started. It appears, therefore, that, if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so, I do not think the importers should gain by the decrease in weight coupled with an increase in value per pound."

The propositions of law stated or involved in this opinion will be considered hereafter, when the exact facts, upon which the questions of law are to be disposed of, have been ascertained. As to these facts, there are, according to the undisputed evidence, several erroneous assumptions in the passage above quoted from the opinion of the Court below.

1. It is not the fact, that "the cargo is actually "worth as much (on arrival here) as when it started." It is necessarily worth less, by exactly the amount of saccharine matter contained in the drainage. This is so great that according to the uncontradicted evidence, this drainage instead of being merely bilge water is molasses — "sometimes so thick as to classify as sugar"—"too fine an article to throw away;" regularly dealt in, duly invoiced at the Custom House and the duties upon it duly paid.

2. It is not the fact, that "if the sugar had been kept for the same length of time in Brazil the same loss in weight by drainage and increase in value per pound would have taken place there."

The only express evidence on this point is that the sugars "will drain anywhere," to some extent. The subject, however, calls for no evidence but the application of the elementary principles of physical science.

The drainage is caused by the presence of water in excess of the percentage which can be held by the sugar in a solid state. As sugar is ordinarily stored in warehouses, a very large proportion of this water escapes by evaporation, harmlessly. Under such circumstances it is only so much of the excess as is unable to escape by evaporation which, in filtering downwards through the sugar, dissolves some part of it before passing out as drainage. In the closely packed and confined hold of a vessel, on the contrary, the dissipation of the moisture by the harmless process of evaporation is almost wholly prevented. Substantially all the water contained in the sugar must filter downwards through tier upon tier of bags to the bottom, taking toll of each successive bag through which it passes until the saturation point is reached, and it passes into the bilge as molasses so thick often "as to classify as sugar."

3. It is not the fact, that "the value of the cargo as "a whole would not have been affected thereby" (viz., by the drainage). This is obvious from the considerations already adverted to. The residue left after the drainage is, undoubtedly, pound for pound, of higher saccharine percentage, and, therefore, value, than when shipped. But the total increase in value thus obtained necessarily falls short of compensating for the loss by drainage by exactly the value of the saccharine matter lost in the drainage.

First Point.

The question raised by this appeal is one of the construction of the law and the facts respecting the classification of imported merchandise, and the rate of duty imposed on it under such classification. It was, therefore, properly presented under the

provisions of Section 14 of the act by protest and appeal to the Board of General Appraisers in the first place, and thereafter under the provisions of Section 15, by the application to the Circuit Court for a review of the questions of law and fact involved in the decision, and by this appeal is now regularly before this Court for review.

In three of the cases it appears from the express statement of the appraiser's report that the value of the sugar per unit of quantity was "advanced from" "the market value when shipped" to a higher figure "in the condition landed owing to its increased value "due to drainage on the voyage of importation." In the *Cuvier* case the same thing appears from the evidence taken. The cases are, therefore, brought directly within the principle of the following decision :

U. S. vs. Herrman, 91 Fed. Rep., 116 :

By the Court, Wallace, C. J., Lacombe and Shipman, JJ., concurring :

"If the collector, in deciding the dutiable value of the importations in controversy, proceeded upon an appraisement by which that value was found by adding a commission to the wholesale price or market value of the merchandise in the foreign market at the time of exportation, that decision was reviewable by the board of general appraisers under Section 14 of the Customs Administractive Act ; and the decision of the board affirming the collector's decision was properly reversed by the Circuit Court, because such a decision would have proceeded upon an improper construction of the law" (U. S. vs. Passavant, 169 U. S., 16).

Second Point.

The one essential feature which differentiates the taxation of a civilized government from the arbitrary exactions of a barbaric one is that it is absolutely fixed, uniform, unvarying, calculable in advance ; never imposed *ex post facto*.

In a business where the success of the manufacturer depends upon the fractions of a cent by which he can diminish the cost of his manufactured product, it is indispensable that he shall be able to reckon beforehand with proportionate exactness the various factors of this cost, not the least important of which is the amount of the duty which the Government will exact upon the imported raw material. Any construction of a tariff law which makes such a computation impossible and permits an appraiser to depart from the plain letter of the law upon which the merchant has reckoned, for the sake of achieving what the appraiser or his superiors may consider "equitable" results, leaves the merchant to conduct not a business, but a lottery.

Merritt vs. Welsh, 104 U. S., 694, 702:

BY THE COURT: "If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said, with much truth, 'Where law ends, tyranny begins.'"

Third Point.

In full recognition of this principle, the legislative department of the Government has, in language noteworthy for its clearness and particularity, announced to the sugar refiner not only the rate of duty which it will impose upon his imported merchandise, but the methods to be pursued and the standards to be adopted by the executive department of the Government in assessing these duties.

To these conditions the sugar refiner had the right, and is, indeed, invited to adjust his business. There-

after if by importing raw material, different from what he had previously imported only in some particular immaterial to himself and his customers, he could effect a substantial saving in the amount of duties payable upon his merchandise, it was his legitimate right and privilege to do so. So long as Congress does not interfere to deprive him of this right, it certainly is not the appropriate function of any member of either the executive or the judicial department of the government to do so, merely because "he does not think the importer should gain" by the successful adaptation of his business to the conditions under which the legislative department has authorized him to conduct it.

Upon precisely this ground the Courts have already held, for instance, that if the dealer in woolens can escape the payment of a high rate of duty upon his goods by importing, instead of pure woolens, woolens with an admixture of cotton so slight as to be wholly immaterial for any purpose except to bring them under a particular classification of the tariff act, or the sugar importer can accomplish the same result in his business by importing, instead of light colored sugars, sugars of a darker hue but for his purposes equally as good, the saving to the importer is in each case a legitimate one, which neither the customs officers nor the Courts have the right to prevent.

It must, then, be equally true, that if the sugar importer found it, under the Tariff Act of 1895, to be to his advantage to import a larger percentage of green or wet sugars, and a smaller percentage of dry or cured sugars than theretofore, the opportunity to lessen thereby the cost to himself of his raw material is a wholly legitimate one, by which he not only "should gain," but must gain, at the peril of being crowded out of business by less Quixotic competitors.

Seeberger vs. Farwell, 139 U. S., 610:

By the Court: "The Court [below], in its opinion, said that the Collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, and assumed also that so small a quantity of cotton would

not materially change the character of the goods as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the Court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved by the admixture of even a small percentage of cotton, if they could do so; and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

'*We concur in this view.*"

Merritt vs. Welsh, 104 U. S., 694–701:

By the Court: "The color standard [*var.*, the condition of the merchandise when shipped, as a standard] has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom house to follow. As before said, Congress alone has the power to lay taxes and duties.

"Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color

standard is insufficient, a different one is ready to hand—that of the polariscope, or other chemical test. If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement is desirable as a dutiable standard, let it be so declared by the laws, and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.' * * *

"Congress did not leave any room for doubt as to its meaning. It used apt terms to express it—terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience or loss to the treasury need only be temporary; it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used."

Fourth Point.

Among the restrictions which Congress has proclaimed to the sugar refiner will be observed by all the departments of the Government in assessing duties upon his imported raw material there are at least three, each one of which it is in turn necessary to ignore or evade in order to sustain the action of the appraiser in this case.

1. The first of these conditions is that what the refiner is to be required to pay duty upon is "sugar;" another that the duty which he must pay upon this is forty per cent. of its value at the time it is exported from the foreign country, and in the condition in which it is there bought and sold for exportation.

In other words, the duty is imposed not upon the chemically pure substance known as sucrose (C_{12} H_{22} O_{11}), but upon the familiar commercial article of mer-

chandise known as "sugar," a compound not only of sucrose, but of various impurities, and of water constituting from one to eight per cent. of its weight. The amount of duty is to be forty per cent. of the value in the foreign country of each pound imported of this compound as these elements consisted in it at the time of exportation.

So long, therefore, as the merchandise which it is the duty of the appraiser to value at its actual market value in the foreign market at the time of exportation, and in the condition in which it is there bought and sold for exportation, was at that time and in that condition "sugar" and is still "sugar" when landed, the percentage of water which it contains when landed or the additional percentage of water which it lost during the voyage of importation is a wholly irrelevant matter to the appraiser, which he has no right to consider for any purpose. He must take each "unit of quantity," be it hundredweight or bushel, of sugar actually landed, and ascertain its condition when exported. If he finds that at that time and place the percentage of water it contained was large, and its value per pound correspondingly small, he must appraise it as he finds it then to have consisted, with the different percentages of sucrose, impurities and water as they then were. He has no more right to eliminate from his consideration the water it then contained simply because at a subsequent stage of its history, with which he has no concern, some or all of this water was, in whatever way, expelled, than he has to disregard every other constituent element of it except the sucrose and appraise that only. The fact that it is "sugar," not "sucrose," which is subject to duty and required to be appraised, forbids that course in either case.

This rule of law the Government would find no difficulty in admitting, if the duty were a specific one per pound, and it were the importer who was seeking to eliminate the water from the merchandise to be appraised and taxed. There cannot be one rule for the importer and another for the Government upon the

same subject. What the rule is upon this subject has already been settled by authority.

Earnshaw vs. Cadwalader, 145 U. S., 247, 259:

Under the provisions of the tariff act iron ore was charged with a duty of 75 cents per ton landed. The plaintiff gave evidence tending to show that a considerable percentage of the weight on which the duty had been assessed by the collector was made up of water mechanically present in the ore; that the amount of such water which iron ore contained varied according to circumstances from practically nothing up to 25 per cent.; and that practically all the moisture would dry out in the sun or would be driven out by heating the ore to the boiling point of water. The importer contended, therefore, that he could be obliged to pay duty only upon the iron ore itself, and not upon the percentage of water mechanically contained in it.

By the Court: "It appeared by the evidence that dried ore was an article unknown to commerce or trade. * * * That water mechanically mixed is one of the natural and constant constituents of the iron ore of commerce, both domestic and foreign; and that there is no warrant for the conclusion that the iron ore of the statute is limited to dry ore, or ore with such mechanically mixed water excluded."

Held, that it was the duty of the collector to assess the duty upon the ore in its condition at the time as of which he was required to appraise it, including whatever percentage of water it then contained.

2. The third of the conditions referred to is that it is only upon "articles imported" that the duty can be imposed. Not only is it "sugar," not sucrose, which the appraiser must appraise at its value when and where exported, and in the condition in which it then was; but it is only so much of the sugar as actually reached the United States and was landed there—to wit, the eighty-four per cent. of the amount originally exported—that the appraiser can thus appraise. No duty can be imposed upon the sixteen per cent. of the sugar originally exported which, during the voyage, was lost in the bilge and abandoned by the importer. It is simply an indirect way of doing what is thus forbidden, to say that

the "sucrose," though not the impurities and the water, of this sixteen per cent., has, since the date as of which the appraisement must be made, for the most part passed into the eighty-four per cent. landed. "Sucrose" is not an article of commerce known to the tariff law. If 16 out of every 100 pounds of "sugar" shipped has, as sugar, disappeared during the voyage, it has thereby escaped the jurisdiction of the appraiser. He cannot pursue a part of its former constituent elements into something else, and tax it there. What is left subject to the exercise of the appraiser's jurisdiction is simply the 84 pounds of sugar remaining to be appraised by him at its value when exported, irrespective of any subsequent change in its condition for good or bad. The case is not one of a claim by the importer for some allowance for damage sustained during the voyage by merchandise actually imported, though in a damaged condition. The question is simply whether the importer shall be required to pay duties upon a dutiable article shipped on board for export, but lost during the voyage, and, therefore never imported; and the fallacy of the argument of the Court below, it is respectfully submitted, consists precisely in evading this question by using the same word "cargo" in two different senses—first, as denoting the sugar shipped on board; secondly, that landed in New York —and treating both as the same thing.

Marriott vs. Brune, 9 Howard, 619:

Under the Act of July 30, 1846, imported sugar was taxed at 30% *ad valorem*. The sugar in question was imported in loose hogsheads from Puerto Rico and lost by drainage during the voyage about five per cent. of the invoice weight. The collector had assessed duty upon the invoice weight, refusing to make any allowance for leakage and drainage. Held error.

HEAD NOTE: "The true construction of this law is that the duty should be charged only upon that quantity of sugar and molasses which arrives in our ports, and not upon the quantity which appears upon the invoice to have been shipped."

BY THE COURT: "The general principle applicable to such a case would seem to be that revenue should be

collected only from the quantity or weight which arrives here, that is, what is *imported*, for nothing is imported till it comes within the limits of a port. * * * When the duty was specific on this article, being a certain rate per pound before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty and not in the quantity on which it should be assessed. On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not at all reach the United States, or we shall in truth assess here what does not exist here."

Shaw vs. Dix, 72 Fed. Rep., 166 :

The collector exacted duties on the whole number of cocoanuts specified in the invoice, deciding that section 23 of the act of June 10th, 1890, was applicable, and that under the ruling in U. S. vs. Bache, 59 Fed. Rep., 762, the shortage was a damage to the merchandise, for which no allowance could be made, as it did not amount in any case to ten per cent. of the total quantity of the invoice, and there could consequently be no abandonment to the United States as required by that section. The importers duly protested, claiming that they asked for no allowance for damage to the cocoanuts which actually arrived, and that they desired to pay for all cocoanuts discharged from the vessel, whether sound or damaged ; but that the mass of matter which remained after discharging the cargo represented cocoanuts which, having rotted or been broken up on thevoyage, ceased to be merchandise of any kind.

By the Court : It is quite true that the allowance for damage to imported goods is expressly regulated by section 23 of the act of June 10, 1890. But it is true now, as it was before that act was passed, that duty is not to be assessed on an article which does not arrive in this country " (Marriott vs. Brune, 9 Howard, 619). * * *

" In U. S. vs. Bache, 59 Fed. 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed but damaged. It was clearly a case within the language of section 23."

3. The application of the principles just considered is in nowise affected by the fact that the probable loss during the voyage of a given percentage of the sugar shipped, is considered by the purchaser and seller when the contract of sale is made, and is in a way provided for either by a direct discount from the current market price or by a guarantee that the loss shall not exceed a fixed percentage or both.

U. S. vs. Southmayd, 9 Howard, 637 :

This case involved the same question as Marriott vs. Brune, *supra*, with the additional fact in evidence "that the purchaser abroad takes into consideration the probable loss (by drainage during voyage to the United States) in fixing the price to be paid."

By the Court: "It is argued that the price abroad is, therefore, lower in this proportion on this account, and hence that no deduction should be made here for what is taken into consideration there. But the first answer to this position is that if the price is fixed too low there or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price, and it must be presumed they would raise it if required by all the facts. [In the cases at bar the appraisers did without protest from the importers exactly this. The "6s. 8d. Avt.," which they found to be "the market value when shipped," was obtained by them precisely by "raising the price, a less amount than the "6s. 8d. Avt.," to that figure as the true "market value when shipped." It is not of this legitimate "raising of the price" to obtain the true market value, of which the importers here complain ; but of the further addition to the market value thus raised, of six pence per cent., to cover the increase in value during the voyage.] In the next place this calculation by the merchant abroad in fixing the price is a mere speculative or commercial one connected with the profit and loss, and not with a view to the duties to be assessed here. Again, the duty here is regulated by law and not by any estimates of such a character by men of business, and by law it is imposed on the quantity entered here and not the quantity shipped abroad and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners. Again, if the owner was benefitted by this drainage in the improved quality of the sugars

or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad. But, as explained in the preceding case, such does not seem to be the current of the evidence. There are cases likewise of imports here, made by the producers of the article abroad. In those, this supposed element in the price to prevent the justice of a reduction in the weight here could hardly exist, as there is no sale abroad, and this shows the incongruity and want of applicability of such a fact to constitue a rule in any case for estimating *ad valorem* duties."

Fifth Point.

Except for the limitations of the Constitution, and the considerations of public policy referred to in Point Second, it would doubtless have been competent for Congress to provide that imported merchandise shall be appraised both at its value in the foreign country at the time when exported, and in its then condition, and at its value here at the time when landed here and in its then condition ; and that the duty shall be assessed upon whichever of the two values thus ascertained shall be the higher ; as was substantially the actual practice pursued in the case at bar. Certainly, it was open to Congress to adopt in advance whichever of these two standards of value it should consider on the whole the more favorable to the Government and the more just to the importer. In the exercise of this power it has for the present, at any rate, adopted the former ; and, it must be supposed, for the reason that, upon the whole and in the majority of cases, it was of the opinion that this standard was the better.

Doubtless no fixed standard can be adopted to which the importer will not be able, in some cases, at any rate, to adapt his business more successfully than was anticipated by Congress, or is pleasing to the custom officials or to the Courts. Whatever the working of

the existing standard of value in the case at bar, there is every reason to suppose that, in the vast majority of cases, Congress was right in anticipating that it would work to the advantage of the Government. Green sugars are probably one of the very few articles of merchandise which do increase in value after the time, as of which they must be appraised, when they are laden aboard the vessel for export to this country. Certainly a long sea voyage is not commonly regarded as likely to enhance the value of most articles of trade. Green sugars and Madeiras are, perhaps, the only exceptions. It was with the wisdom of experience that Congress determined in taxing imported merchandise, to take its value before rather than after it had been subjected to the perils of a sea voyage. Having adopted this alternative, the statute shows that Congress has relentlessly pursued every advantage which this choice gives it. After the value of merchandise at the date of exportation has once thus been ascertained, no allowance for damage sustained by it during the voyage, it is provided by Section 23 of the Act of 1890, shall be made in the assessment and liquidation of duties thereon. Full duties upon the cargo as laden on board must be paid by the importer, unless he is willing actually to abandon to the Government as not merely damaged, but destroyed, more than 10 per cent. of the total invoice. If the Government is to be thus rigorous in holding the importer to the value of the merchandise at the time of exportation, there surely need be no scruples felt by the Courts in allowing the importer his legitimate right to hold the Government to the same value on the rare occasions when it is to his advantage to do so.

Last Point.

The judgments of the Circuit Court should be reversed and the cases remanded to it with instructions to assess the duty only upon the amount found by the appraiser to have been the market value of the cargoes when shipped, and not upon any increase in value during the voyage.

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